89-307

No.

Supreme Court, U.S.
FILED
AUG 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WALTON SUTHERLAND,

Petitioner,

vs.

THE UNITED STATES POSTAL SERVICE
and EDWARD R. TISCH, POSTMASTER GENERAL
OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WALTON SUTHERLAND
Petitioner Pro Se
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QUESTIONS PRESENTED

Whether a federal court can dismiss a timely filed complaint for lack of timely service if the Clerk of the court violated the Federal Rules of Civil Procedure by failing to issue a summons forthwith to the plaintiff and by failing to tender the summons to the plaintiff so that the plaintiff might be able to timely serve the summons and complaint upon the defendants of an action.

PARTIES TO THE PROCEEDING

The petitioner is Walton Sutherland, a former Postal Mechanic of the United States Postal Service appearing pro se. The respondent is the United States Postal Service and Edward Tisch Postmaster General of the United States. Said respondents were represented by Samuel A. Alito, Jr., United States Attorney of Newark, New Jersey.

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NO:

In The
Supreme Court of the United States
October Term, 1988

Walton Sutherland,
Petitioner,

vs.
The United States Postal Service and
Edward R. Tisch, Postmaster General of the
United States,
Respondents

Petition for a Writ of Certiorari-
To the United States Court of
Appeals for the Third Circuit

Petitioner, Walton Sutherland, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit dated July 13, 1989.

OPINION BELOW

The order of the Court of Appeals for the Third Circuit affirming the order of the District Court for the District of New Jersey (Newark) is dated July 13, 1989 and is set forth as Appendix "A" (App. A). Upon information and belief, the aforesaid order is not reported .

The order of the District Court of the District of New Jersey (Newark), dated May 17, 1989, which denied the motion of the petitioner to correct a clerical error is set forth as Appendix "B" (App. B).

JURISDICTION

Upon information and belief, the order of the United States Court of Appeals for the the Third Circuit was entered on or about July 13, 1989. The Petiton for a Writ of Certiorari is filed within the time permitted for filing. This Court's jurisdiction to review the case rests upon 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

United States Constitution, Article V, 28 U.S.C. §1254, and Federal Rules of Civil Procedure 1, 4(a), 4(d) and 60(a) are reproduced in pertinent part in Appendix "C" (App. C).

STATEMENT OF THE CASE

The appeal to the United States Court of Appeals for the Third Circuit arose out of a Title VII action filed by the petitioner, Sutherland, in the United States District Court for the District of New Jersey. Although timely filed, process did not issue to the petitioner in order that the summons and complaint could be served before the statute of limitations had run. The petitioner herein filed his complaint as a pro se litigant in the District Court of New Jersey on July 23, 1987. Subsequently, the Clerk of the District Court never issued a summons to the petitioner who awaited delivery of the summons to him pursuant to Federal Rule of Civil Procedure 4(a) so that he might effect proper and timely service. Five days after the filing of the complaint, the Clerk of the Court issued a summons and forwarded the same to the U.S. Marshall who did not

serve the complaint in a timely manner, i.e., before the Statute of Limitations had run. The District Court of New Jersey dismissed the complaint for lack of timely service upon a motion of the United States Attorney.

The petitioner herein made a motion before the District Court pursuant to Federal Rule of Civil Procedure 60(a) in order to correct the clerical error of the court by not following Federal Rule of Civil Procedure 4(a). The district court denied petitioner's motion by way of an order dated May 17, 1989. The Court of Appeals for the Third Circuit affirmed the aforesaid order of the District Court by way of an order dated July 13, 1989.

The jurisdiction of the Court of Appeals for the Third Circuit to review the order of the District Court of New Jersey emanated from 28 U.S.C. §1291. The District Court of New Jersey's jurisdiction to

entertain the original action emanated from Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq., as amended, and the Rehabilitation Act of 1963, 29 U.S.C. 791 and 794(c), as amended.

THE REASONS FOR GRANTING THE PETITION

This petition should be granted because this case involves monumental issues of constitutional and procedural importance.

The Fifth Amendment of the United Constitution Forbids the Denial of Access to the Court and Due Process of Law Because of a Clerical Error of the Court.

The Federal Rules of Civil Procedure require that the summons and complaint be served together. See Rule 4(d) of the Federal Rules of Civil Procedure as cited in Appendix C. In the case at hand, the petitioner was not issued a summons pursuant to Federal Rule of Civil Procedure 4(a) so that he could be able to comply with the mandates of Rule 4(d), supra. Rule 1 of the Federal Rules of Civil Procedure requires that the Federal

Rules of Civil Procedure govern the procedure that is to be followed in all federal district courts. See Appendix C.

It is argued that the error of the clerk of the district court regarding federal rule of civil procedure 4(a) was a denial of due process of law as guaranteed by Article V of the Fifth Amendment of the Constitution of the United States and a denial of access to the courts. Said error should have been corrected by the lower courts upon petitioner's motion pursuant to Federal Rule of Civil Porcedure 60(a) which affords a remedy for the clerical errors of the court.

THE ORDER OF THE DISTRICT COURT IS STREWN WITH ERRORS

The motion of the petitioner pursuant to Federal Rule of Civil Procedure 60(a) did not seek to vacate a decision of the district court but rather it did seek to redress an order of that court. Furthermore, there has

been no prior ruling by the district court or the court of appeals, herein, upon the issues raised by the petitioner's motion pursuant to Rule 60(a).It is argued that whether the law presented by the petitioner was considered by the district court or the court of appeals is irrelevant if there has been no ruling by either court upon the applicability of the law to the case at hand. Finally, at the time that the district court's order was signed there was nothing pending at the Supreme Court. Even if there were, such a fact would only constitute a basis for deferring decision upon petitioner's motion and would not constitue a basis to deny petitioner's motion.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: Jersey City, New Jersey
August , 1989

Respectfully submitted,
Walton Sutherland

APPENDIX

Order of the Court of Appeals
For the Third Circuit, dated
July 13, 1989, Appendix A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
C.A. No. 89-5424

Walton Sutherland

vs.

U.S. Postal Service

(D.N.J. Civ. No. 87-2957)

Present: Gibbons, Chief Judge; Stapleton and Hutchinson, Circuit Judges

Submitted by the Clerk is the within appeal for possible summary affirmance pursuant to Chapter 17 of the Internal Operating Procedures in the above case.

Respectfully,
Sally Mrvos (EID)
Clerk

SM/EID/jm

The judgment of the district court will be summarily affirmed. The mandate will issue

forthwith.

By the Court,

s/
Circuit Judge

Dated: Jul 13 1989
DR/cc: WS
JM

Order of the District
Court of New Jersey,
dated May 17, 1989,
Appendix B

United States District
Court District of
New Jersey
Civil Action No.87-2957

Walton Sutherland, :
Plaintiff, :
:
v. :
United States Postal :
Service, et al., :
:
Defendants. :

This matter having been opened to the court on motion of plaintiff for an order vacating the decision of this court pursuant to which his complaint was dismissed, and having dismissed the complaint for failure to file and serve a timely complaint which named and served the proper defendant, see Sutherland v. United States Postal Service, No. 87-2957 (D.N.J. January 13, 1987) (un-

published) ; and this decision having been affirmed by judgment order of the Court of Appeals for the Third Circuit, Sutherland v. U.S. Postal Service, 860 F.2d 1076 (3d Cir. 1988); and having been apprised that plaintiff has petitioned the United States Supreme Court for Certiorari; and as plaintiff has failed to present new law, authority, facts or circumstances previously considered by the district or appellate court; and as review of this matter is pending before the United States Supreme Court; and having considered this matter without oral argument;

IT IS ON THIS 17th Day of May, 1989;

ORDERED that motion of plaintiff for an order vacating the order of this court dismissing the action and for reinstatement of the within action is denied.

s/
HAROLD A. ACKERMAN
U.S.D.C.

Constitutional and Statutory Provisions Involved, Appendix C

The fifth amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §1254(1)

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

****

The Federal Rules of Civil Procedure

Rule 1.

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 4(a).

Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

Rule 4(d).

The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary.

Rule 60(a).

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on motion of any party after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be corrected before the appeals is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.